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No. 88-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW ORLEANS PUBLIC SERVICE INC.,

Petitioner,

v.

THE COUNCIL OF THE CITY OF NEW ORLEANS, JOSEPH I. GIARRUSSO, LAMBERT C. BOISSIERE, JR., MICHAEL EARLY, JAMES SINGLETON, DOROTHY MAE TAYLOR, JOHNNY JACKSON, and PEGGY WILSON,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In the respondents' view, "[t]his case marks the third time in as many years that [petitioner] has sought to obstruct state court review of a state regulatory matter of extreme local concern." Opp. p. 1. Petitioner's view is different: this is the third time that lower courts have improperly rebuffed petitioner's efforts to have a federal court vindicate explicit federal rights and prevent the massive "trapping" of petitioner's FERC-mandated Grand Gulf 1 costs.

Respondents' Opposition confirms that Supreme Court review of the abstention issue is not only appropriate now, but a matter of great national importance. Respondents cannot, and do not, dispute that three things have happened in the year and a half since the Solicitor General, in response to this Court's invitation, recommended that the Court review the abstention issue present-

ed in this case. First, as the respondents concede (Opp., pp. 7-8), the "procedural problems" identified by the Solicitor General have disappeared, and the abstention issue is now indisputably ripe. Second, this Court's June, 1988 decision in *MP&L*[1] has laid to rest any doubt that the sole issue to be presented to the federal court is one of federal law. Third, the Fifth Circuit—from whose judgment this petition is taken—has expressly stated that its abstention holdings conflict with those of numerous other courts of appeals. App. 20a. It recognizes that petitioner's clear federal rights under *MP&L* would probably have been vindicated by now, and this case would have come to an end, if the case had arisen in any one of at least three other courts of appeals. App. 15a. The Fifth Circuit has also issued an unusual plea that this Court resolve the conflict. App. 20a.

Respondents' sole response is to argue that there is nonetheless no conflict. Respondents claim that the courts of appeals that refuse to abstain in the face of a preemption claim do so only where preemption is "readily apparent." Opp., pp. 13-25. Respondents miss the obvious point. A "readily apparent," dispositive federal rule is precisely what this case involves. For years, before FERC and elsewhere, the respondent New Orleans City Council ("New Orleans") has contended that a fair Grand Gulf 1 allocation for New Orleans is 9%. It lost that argument before FERC, which assigned a 17% allocation to New Orleans. This Court in *MP&L* held that state retail regulators cannot avoid FERC's Grand Gulf 1 allocation under the guise of a prudence review. Yet that is precisely what the New Orleans "rate order" has done. To be sure, New Orleans asserts that its prudence review is different from the prudence review suggested by the Mississippi Supreme Court (Opp., pp. 25-27), but this assertion ignores the *MP&L* holding that all state prudence reviews are foreclosed by the very FERC allocation of Grand Gulf 1 that is at issue here.

[1]*Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, No. 86-1970, 56 U.S.L.W. 4751 (June 24, 1988).

Accordingly, the sole argument advanced by petitioner in the Louisiana federal court was the same as this Court's eventual holding in *MP&L*: that retail regulators must include FERC-approved wholesale costs within their retail rates.[2] New Orleans has done the same thing that Mississippi attempted to do—exclude some or all of the FERC-allocated Grand Gulf 1 costs from retail rates.[3] Federal law prohibits the New Orleans action just as it prohibited the Mississippi attempt. And because this federal principle is dispositive of the entire dispute between petitioner and respondents, petitioner is entitled to have this federal principle declared by a federal court.

The Fifth Circuit's plea should be heeded. The petition for certiorari should be granted.

[2]All of the cases between New Orleans and petitioner were decided without the guidance of *MP&L* except for the July 28, 1988 Fifth Circuit decision on which review is sought.

[3]In its Opposition, New Orleans quotes from its Resolution No. R-85-636 (p. 7) but omits the most pertinent portion of that Resolution:

> "The Council's investigation shall include inquiry into all aspects of NOPSI's prudence regarding its decisions to enter into its arrangements to purchase a portion of Grand Gulf 1 for the purpose of determining what portion, if any, of NOPSI's Grand Gulf 1 expense shall be assumed by its shareholders, rather than passed through to its retail ratepayers."

"NOPSI's Grand Gulf 1 expense" results solely from the FERC allocation.

Respectfully submitted,

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